IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

CIVIL SECOND APPEAL No. 142 of 1989

SMT SAJJAN BAI & ORS
V/S
SHIV SHANKER & ORS

Mr. SIDHARTH JOSHI for Mr. JP JOSHI, for the appellant

Mr. SANJEEV SHARMA, for the respondent

Date of Order : 13.12.2006

HON'BLE SHRI N P GUPTA,J.

JUDGMENT

This appeal has been filed by the defendant against the judgment and decree of the two learned courts below, which have partly decreed the plaintiff's suit, and has directed removal of construction, made by the defendant, to the extent of the plaintiff's Chabutari.

The facts of the case are, that the plaintiffs respondents filed a suit for mandatory and perpetual injunction against the defendants, being father and son, alleging interalia that the houses of the parties adjoin each other. The house of the plaintiffs was described in para-2 of the plaint, and it was pleaded that the plaintiffs' house has two openings; one in the northern side, and the other in the west, and upto the land of the house there are Puckka Chabutaries, and steps are there in the middle of the Chabutari on either side. It was then

alleged that in the west of the house described in para-2 of the plaint, there exist plaintiffs' other house which has tiled roof, and eaves drops falls towards east on the plaintiff's house, which water flows through a spout, and finds outlet through the Chabutari east west, situated in the north of the house. This spout is said to be projecting to the extent of 1½ x 1 ft. It is then alleged that in the north, the house of the defendant was in line with the house of Kanhaiyalal, but while reconstructing the house, the defendant has proceeded ahead to the extent of 8ft. in raising construction, without permission of the Panchayat, for which proceedings are going on, and thus the plaintiffs' western Chabutari measuring 22ft. long and 8ft. wide has been encroached to the extent of 8 ft., and apart from raising construction thereon, the defendant has installed Toddies, and the projection has been erected to the extent of 2¼ ft. so as to close the spout, and obstruct the passage of water. Request for desisting from raising construction yielded no result, thus the suit was filed, praying for removal of the construction made by the defendant, and restoration of possession to the plaintiff. Perpetual injunction was also prayed, restraining the defendant from interfering in the plaintiffs' possession over the said Chabutari.

The defendant filed written statement, contending interalia that the house is not on the plaintiffs' land,

but the land was of Maafidaran of village Bhatoli. The ownership of the Chabutari to be vesting in the plaintiffs was denied, so also the possession thereon was denied. It was pleaded that the plaintiff had opening in the east which has been closed, and a door has been opened in the north, and therefore, there is no occasion for any Chabutari being there. Then, allegation about discharge of water was also denied. It was denied that the defendant has raised any construction. It was pleaded, that rather the construction, whatever was raised, was raised in the year 1965, and within the knowledge of the plaintiff, to which the plaintiffs never objected. Then, after number of years when the plaintiff no.1 happened to be elected as Sarpanch of Gram Panchayat, he under his signatures sent a notice on 14.5.1977, to the effect that the plaintiff no. 2 and the son of the plaintiff no. 1 want to purchase the Chabutari from Gram Panchayat, and objections were invited. Then on 30.7.1977 it was resolved by the Gram Panchayat, that the land of Chabutari be sold as prayed, which sale was assailed before the Collector, and the Collector cancelled that resolution. It was denied that the plaintiff is entitled to any injunction for demolition of construction. Then, in additional pleas, the plea of estoppel and acquiescence was raised.

On these pleadings, the learned trial court framed as many as 12 issues. Issue no. 1 was as to whether

on either side of the northern door, east and west, there are Chabutaries of ownership and possession of the plaintiff up to the line of the building. Then, issue no. 2 was regarding passage of rain water, and existence of spout. Then, issue no. 3 was about the defendant having encroached on 8 ft. x 8 ft. land on western Chabutari of the plaintiff, and having erected 2 ¼ projecting Todas, and obstructing the spout. Then, issue no. 4 was about the plaintiffs' right to have these removed. Then, issue no. 6 was about the construction having been raised by the defendant in the year 1965, and the suit being barred by time. Other issues need not detain me.

The learned trial court deciding issue no. 1 considered the evidence of the parties, oral as well as documentary, and found, that it is not clear as to how the plaintiffs claim the title in the land, as the document produced by the plaintiffs, and even the plaintiffs' witness P.W. 9 deposed, the land to be of Panchayat. Then, existence of Chabutaries was found, and it was found that the length of Chabutari is not established to be 22 ft., rather it appears to be only 13 ft. 9 inch, and the Chabutari was found to be in ownership and possession of the defendant for the last number of years. Then, deciding issue no. 2 it was found, that the water of the eaves drops flows, and finds passage through the spout on the western Chabutari. Then, deciding issue no. 3 it was found, that

the total length of the house, including Chabutari, is only 35 ft. which is in possession of the plaintiff, excluding 8 ft. x 8 ft. land in dispute. Then, regarding Todas it was found that they are projecting, and have been covered by stone slabs, and thereby the spout has been covered. Thus, the issue was decided in the manner, that the defendant has not encroached upon the plaintiffs 8 ft. x 8 ft. land, but has covered 2¼ wide portion of the Chabutari, by erection of Toddies and Rosh. Then, deciding issue no. 4 it was found, that the construction of 8 ft. x 8 ft. land was completed in 1967, but the Rosh was erected in 1979 rather after 22.5.79. Thus it was found, that the principle of estoppel by acquiescence is not attracted. Obviously in that view of the matter issue no. 6 was also decided in favour of the plaintiff. In the result, the suit has been decreed as above.

Aggrieved of this judgment and decree the defendant filed appeal, and the plaintiff also filed cross objections. In para-11 of the judgment it was noticed by the learned lower Appellate Court, that the plaintiff had opened the northern door 35 years back, at which time there was no Chabutari, and even the plaintiff himself admitted, that the Collector had set aside the order of Chabutari. Then, it was also noticed that the learned trial court had inspected the site on 20.8.1986, and a memo was prepared, wherefrom it transpires, that some portion of Chabutari is

Kacha while some portion is Puckka, while according to the plaint the entire Chabutari is Puckka. In that view of the matter, the finding of the learned trial court, about the plaintiff being using the Chabutari was affirmed. Likewise, the finding about 8 ft. x 8 ft. being not proved to be of ownership and possession of the plaintiffs was also affirmed. Substantially on that basis, the appeal and cross objections were both dismissed.

This appeal was admitted on 21.9.1995, without framing any substantial question of law. Thereafter the appeal came up for hearing, and on 9.1.2006, this Court framed following substantial question of law:-

> "Whether the courts below committed serious error of law in the facts of the case in granting decree for mandatory injunction and whether the courts below should have awarded compensation in case, it was found that some right of the plaintiff is affected by the construction raised by the defendant and if that construction was raised by the defendant infringing the plaintiff's right?"

And the appeal was again admitted, and on 2nd stay application the execution of the decree was stayed, by confirming the earlier order dt. 24.1.1997, and the appeal was put up for hearing in due course. Thereafter it again comes for hearing.

The plaint allegations are about the Chabutari in

question being in unobstructed use and occupation of the plaintiffs, for the last number of years, and then in para-3 it is pleaded, that the water discharges from the spout on the Chabutari, which is in possession and ownership of the plaintiff. Then, in para-4 it has been claimed that the defendant has encroached on 8 x 8 ft. land of Chabutari and has raised construction. Thus, it is clear that even in the plaint, the plaintiffs have not come with a clear and categoric case about his ownership on the land covered by Chabutari, rather in para-2 has come with a story of being in independent and continuous use and occupation of Chabutari for the last number of years, and then in para 3 and 4 in a passing way has referred to the Chabutari to be of his ownership. As against this, the defendants' clear case is, that the plaintiff managed the sale of land of Chabutari in the name of his brother Kunteshwar and son Dharnidhar for a sum of Rs. 51/-, and on coming to know of that, the matter was challenged before the Collector, and the Collector vide order dt. 11.11.1978 set aside the resolution of the Gram Panchayat, and thus the sanction was cancelled. In this sequence a look at the statement of P.W.1, the plaintiff himself, would show that in cross examination he has deposed "यह गलत हैं कि मैं जब सरपंच था तब इस जमीन के 51 रू. लेकर मेरे भाई कुन्तेश्वर को निर्माण की स्वीकृति दी फिर कहा यह बात सत्य हैं कि मैंने 51 रू.लेकर स्वीकृति दी। इस आदेश को जिलाधीश महोदय उदयपुर ने निरस्त कर दिया था यह बात सही हैं।" Thus, admittedly whatever sanction was granted by Gram Panchayat for

construction of Chabutari, had already been cancelled by the Collector, as admitted by the plaintiff, and the defendant's case is that it was so cancelled on 11.11.78.

That being the position, in my view, in absence of any other material on record, to show that the plaintiff had or has any title over the land of Chabutari, it cannot be said, that Chabutaries belong to the plaintiff. May be that they are in existence, and it may also be, that they are being used by the plaintiff. Even the learned courts below have clearly recorded a categoric finding to the effect, that the defendant has not encroached upon the plaintiff's 8 x 8 ft. land. A look at the findings of the learned trial court recorded on issue no. 1 does also show, that self contradictory findings have been recorded, inasmuch as in the same sentence it has been observed that it is not clear as to why the plaintiff has produced such document which shows the land to be of Panchayat, while he claims the land to be of his own. Notwithstanding this, in the concluding part it has been held, that the western Chabutari is of the ownership and occupation of the plaintiff, though the length of the Chabutari has not been found, as claimed. Then, while deciding issue no. 3 and 4 it has been found, that the projecting construction has been raised on the plaintiff's Chabutari, and since the principle of estoppel is not applicable, the plaintiff is entitled to have them removed, and thus, the findings have

been affirmed by the learned lower Appellate Court.

In my view, even these findings, about the Chabutari being of the ownership of the plaintiff, to say the least, is based on absolutely no evidence, whatever. In that view of the matter, it can safely be said, that the learned courts below are clearly in error in finding, that the land of the Chabutari or Chabutari belong to the plaintiff. Of course Chabutaries did exist, and are in use of the plaintiff. It is a different story, that the plaintiff came with a story of Chabutari being there since times of ancestors, but then, while in the witness box he has admitted that he constructed Chabutari 35 years back. It is again a different story, as noticed above, that admittedly the construction of Chabutari, is wholly unauthorised, on the face of the order of Collector, whereby the resolution of Gram Panchayat granting permission has been set aside.

This being the over all state of affairs, it cannot be said, that the plaintiff has any right over the entire column of air above Chabutari, so as to prevent anybody from raising any construction. If anybody can be said to be aggrieved by projected construction, can only be the person in whom the title of the land below the projections vest, which in the present case does not vest in the plaintiff. Therefore, the first part of the question

is required to be decided against the respondent plaintiff, and in favour of the appellant.

The other aspect of the matter, which was pressed into service by the learned counsel for the respondent was, that the water of the eastern house falls through spout, and falls on the Chabutari, which has been obstructed by the projection, and since the plaintiff had been discharging the water through that spout, since the period of time, beyond requisite number of years for prescription that spout could not be closed. I find force in this submission, that the spout cannot be closed. Then, I examined the record from that stand point. I find the site inspection note, prepared by the learned Presiding Officer of learned trial court on 20.7.86, wherein it was noticed, that the spout exists below the projecting construction. If that is the situation, in my view, it cannot be said that the passage of water has been obstructed, while the plaintiff's case is that the passage of water has been obstructed. It is also significant to note, that the defendant himself has also admitted, that the water of the plaintiff does fall on the Chabutari.

In my view as the things stand it does not appear that the passage of water through the spout has been obstructed. However, it is made clear, that if the plaintiff is able to show to the Executing Court, that by

the complained construction, the passage of water through spout has been obstructed, it will be open to him to have appropriate measures taken in execution, so as to allow free passage of water from the spout.

In view of the above, the remaining part of the question as framed does not arise.

Net result is that the appeal is allowed. The impugned judgment and decree is set aside, with the clarification, that in case the plaintiff is able to show to the Executing Court, that by the complained construction the passage of water through spout has been obstructed, it will be open to him to have appropriate measures taken in execution, so as to allow free passage of water from the spout. The parties shall bear their own costs of the litigation throughout.

(N.P.GUPTA), J.

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